

IN THE  
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	No. SC93555
	)	
KARTEZ HARDIN	)	
	)	
Appellant.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI  
FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS  
TWENTY-SECOND JUDICIAL CIRCUIT, DIVISION 20  
THE HONORABLE ANGELA TURNER QUIGLESS, JUDGE

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APPELLANT'S SUBSTITUTE REPLY BRIEF

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## REPLY ARGUMENT I

The State takes great pains to dissect each of the cases that construes Section 566.030 in Appellant's favor, arguing that "life imprisonment or a term of years not less than five years" plainly allows for sentences of any number of years. But if Section 566.030 were as clear as the State would have this Court believe, the State would not need to resort to such complicated arguments – and there would not be so many examples of conflicting case law.

### 1. *State v. Williams*.

The State concedes that in *State v. Williams*, 828 S.W.2d 892 (Mo. App. E.D. 1992), the Court of Appeals found that a sentence of 100 years was outside the range of punishment when faced with the same statutory language. Resp. Sub. Br. 15. The State complains that the "*Williams* court articulated no reason to support that result." *Id.* But the *Williams* court's reading of the statute did not require the complicated analysis the State believes is lacking. The State argues that the *Williams* court was by implication wrong or unreasonable. Resp. Sub. Br. 17. But *Williams*, along with the other cases discussed by both parties, at the very least demonstrates that the statute is open to more than one interpretation.

This Court consistently holds that "[i]f statutory language is subject to

more than one reasonable interpretation, then the statute is ambiguous.” *State v. Liberty*, 370 S.W.3d 537, 548 (Mo. banc 2012); *Burns v. Smith*, 303 S.W.3d 505, 509 (Mo. banc 2010); *State v. Graham*, 204 S.W.3d 655, 656 (Mo. banc 2006). When no tool of statutory construction can shed light on its meaning, a statute will be strictly construed against the State. *Liberty*, 370 S.W.3d at 553; *State v. Stewart*, 832 S.W.2d 911, 912 (Mo. banc 1992).

## 2. *State v. Davis*.

The State’s argument about *State v. Davis*, 867 S.W.2d 539 (Mo. App. W.D. 1993) assists Appellant’s position. In *Davis*, a defendant challenged his sentences totaling over 900 years as beyond the range of punishment for the unclassified felony of rape. For each count of this crime, the defendant received a 300-year sentence. 867 S.W.2d 542. The range of punishment for the unclassified felony of rape committed in 1989 was, as in this case, “life imprisonment or a term of years not less than five years.” Section 566.030, RSMo. 1986. Like here, the defendant in *Davis* “suggest[ed] that the maximum sentence authorized for the unclassified offense of forcible rape is life imprisonment.” 867 S.W.2d at 542.

The Court agreed, but with a different analysis than what Appellant has argued in this case. Davis was entitled to resentencing within the range of punishment for a class A felony because of the interplay between the “unclassified” nature of the felony and his status as a persistent felony offender. The Court held that in such cases, the range is that of a class A felony. 867 S.W.2d at 543. The Court noted, “Section 557.021.3 specifically applies to the extended term provisions of Section 558.016 and classifies every felony and misdemeanor offense not already classified by statute as class A, class B, class C, or class D based upon the authorized punishment of the underlying offense.” *Id.* Section 557.021.3(1)(a) states that if the charged offense is a felony, then it is a class A felony for purposes of sentencing enhancement “if the authorized penalty includes death, life imprisonment or imprisonment for a term of twenty years or more.” *Id.*

“Thus, for the purpose of sentencing defendant as a persistent felony offender, the unclassified felony rape conviction constitutes a ‘class A’ felony under Section 557.021.3(1)(a).” *Davis*, 867 S.W.2d at 543. A 900-year sentence was outside that range of punishment. *Id.* Appellant, like the defendant in *Davis*, is a persistent felony offender, and due to the interaction of Section

557.021.3 and Section 558.016, arguably the class A felony range of punishment applies.

Regardless of whether *Davis* was correctly decided, it is essentially the same result that Appellant believes the ambiguity in Section 566.030 requires. The holding in *Davis* was recently followed. *Watkins v. Missouri Dept. of Corrections*, 349 S.W.3d 423, 430 (Mo. App. W.D. 2011) (“the unclassified felony of forcible rape constitutes a class A felony for purposes of determining minimum prison terms [for a persistent felony offender] under section 558.019, because the authorized punishment includes life imprisonment or imprisonment for a term of twenty years or more.”). Under either *Davis* or Appellant’s reasoning, a 50-year sentence is outside a range of punishment for an offense with a ceiling of paroleable life. Section 566.030.

*Davis* also supports Appellant’s position in its related finding that the maximum sentence of paroleable life imprisonment was a less severe sentence than Davis’ sentences of 900 years. 867 S.W.2d at 543. Here, Appellant’s date for conditional release will not arrive for 42.5 years on the 50-year sentence at issue. Sections 558.019 and 556.061. This is a more severe penalty than “life” imprisonment, which is today considered to be a sentence of 30 years for purposes of calculating a prisoner’s conditional release date. Section

558.019.4(1). A defendant must serve 25.5 years of a life sentence before parole. Section 556.061(8).

### 3. *Other Cases.*

The State has determined that all of the other cases that support Appellant's position were also wrongly decided by the various appellate courts for a variety of different reasons. Resp. Sub. Br. 19-23. *Olds v. State*, 891 S.W.2d 486 (Mo. App. E.D. 1994) (*Olds II*) granted post-conviction relief after a defendant had been sentenced to 75 years for rape, finding it was outside the maximum of life imprisonment, which was deemed 50 years at that time. *Vanzandt v. State*, 212 S.W.3d 228, 234-256 (Mo. App. S.D. 2007) found that a defendant pleading guilty had been correctly informed of the range of punishment when told the maximum sentence he could receive for the offense was paroleable life imprisonment. *Id.* An additional case that reads the statute consistent with Appellant's position is *Watkins*, 349 S.W.3d at 430, a 2011 case out of the Court of Appeals, Western District. There, construing the 1992 version of Section 566.030 with identical language, the Court of Appeals stated, "at the time of the offense, forcible rape was a felony for which the authorized term of imprisonment was five years to life." *Id.* at 430.

Consistent with this recent holding, the State's own representative at the trial court level argued the maximum sentence was life imprisonment. S. Tr. 11, 14. Certainly, this Court is not bound by the prosecutor's words (Resp. Sub. Br. 23 n. 3), but the State should at least explain why the assistant circuit attorney apparently read the statute as Appellant does. The State has not argued that the prosecutor's statement of the range of punishment was absurd or unreasonable.

The State's attempt to discredit each Court of Appeals decision that favors Appellant does not address the salient point about the statutory language at issue: that over the years, Missouri courts have construed it in two different ways. The State asserts repeatedly in its brief that the language is clear and unambiguous on its face. Resp. Sub. Br. 17, 25, 28. But every indication is otherwise. The Court should consider the actual history of the statute that demonstrates the different ways reasonable jurists have viewed it, a history the State has blithely described as "tortured," to find that it is ambiguously written. Appellant must receive the "lesser penalty" when a statute "allows for more than one interpretation." *State v. Myers*, 248 S.W.3d 19, 27 (Mo. App. E.D. 2008).

On the rule of lenity, the State suggests that Appellant is asking the court to "start and end" its statutory interpretation with the rule of lenity without first applying other canons of statutory construction. Resp. Sub. Br. 25. But that is

not Appellant's intent. Appellant has pointed to the disparate ways it has been applied since 1992, and argued that the different interpretations suggest that the language at issue is ambiguous. Also, notably, the State does not point to any particular canon of statutory construction that Appellant has overlooked. The State merely asserts repeatedly that the language at issue is plain on its face. Resp. Sub. Br. 17, 25, 26, 27.

**4. *Application of Canons of Statutory Construction.***

As to the question of legislative intent, "this Court will use relevant rules of construction to determine whether the otherwise ambiguous term . . . can be clarified." *Liberty*, 370 S.W.3d at 549. "When interpreting a statute, the primary goal is to give effect to legislative intent as reflected in the plain language of the statute." *State v. Moore*, 303 S.W.3d 515, 520 (Mo. banc 2010).

Contrary to the State's argument, it is helpful in discerning legislative intent to compare the statutory language at issue to other, similar statutes with provisions that clearly allow for an unlimited term of years. The crime of armed criminal action (Section 571.015), for example, provides for a "term of not less than three years." Cases such as *Thurston v. State*, 791 S.W.2d 893, 895 (Mo. App. E.D. 1990) and *State v. LaRue*, 811 S.W.2d 40, 46 (Mo. App. S.D. 1991), show only

that certain defendants have challenged the fact that armed criminal action allows for an unlimited term of imprisonment. Appellant cannot discern how they apply to this case, other than to demonstrate that Section 566.030 is different. “This Court must presume every word, sentence or clause in a statute has effect, and the legislature did not insert superfluous language.” *Wehrenberg, Inc. v. Dir. of Revenue*, 352 S.W.3d 366, 367 (Mo. banc 2011). The inclusion of an upper sentence of life imprisonment in Section 566.030 demonstrates the intent that it would have a different range of punishment than Section 571.015.

An additional clue to legislative intent is the fact that defendants who have been found to be “predatory sexual offenders”<sup>1</sup> are required to be sentenced to a paroleable life sentence. Section 558.018.5; Section 558.018.6. “A person found to be a predatory sexual offender shall be imprisoned for life with eligibility for parole.” Section 558.018.6. Under the State’s reading, a first-time offender could receive a more severe sentence than the *required* sentence for repeat, “predatory”

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<sup>1</sup> “Predatory sexual offenders “are defined as those who have previously been found guilty of certain sex offenses, or have committed similar sex crimes in the past, regardless of whether or not a conviction has resulted from those prior acts. Section 558.018.5.

sexual offenders. Section 558.018.6. The State's position means that first-time offenders could be sentenced to unlimited terms of imprisonment that are the functional equivalent of life without parole. But repeat "predatory" sexual offenders can only receive a paroleable term of life imprisonment, and would be eligible for parole much sooner. Section 558.019; Section 556.061(8); Section 558.018.7. This Court will not construe statutes in a way that leads to an absurd or illogical result. *Bateman v. Rinehart*, 391 S.W.3d 441, 446 (Mo. banc 2013).

The State's final point is that courts have, for years, "relied upon" the State's position in this case and "many sentences other than life sentences have been imposed for this and similar offenses." Resp. Sub. Br. 29. Every indication, however, is that lengthy term-of-year sentences for these offenses are not common. Outside of the cases the parties have cited deciding the issue in different ways, there is no indication there are many similar cases. The State has not pointed to any instance of a comparable sentence in a published case that has not been challenged. No floodgate of litigation will be unleashed if the statute is acknowledged to be ambiguous, the rule of lenity applied, and the case remanded for resentencing within the range of punishment. Section 566.030.

## **REPLY ARGUMENT II**

Based on the State's concession on this point, Appellant asks the court to vacate Counts 8 through 12.

## CONCLUSION

Based on Point I, Count 1 must be remanded for resentencing.

Based on Point II, Counts 8, 9, 10, 11 and 12 must be vacated.

Respectfully submitted,

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## CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(g), I hereby certify that a true and correct copy of the foregoing brief was served via the efilings system on **November 1, 2013** to the Office of the Attorney General, P. O. Box 899, Jefferson City, Missouri 65101. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Special Rule 360. This brief was prepared with Microsoft Word for Windows, uses Book Antiqua 13 point font, and does not exceed 15,500 words, 1,100 lines, or fifty pages. The word-processing software identified that this brief contains **2,426** words.

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